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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC., *Petitioners,*

*v.*

FEDERAL TRADE COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

Promptly after this Court's decision in *Goldfarb* v. *Virginia State Bar* but before its decision in *Bates* v. *State Bar of Arizona*, the American Medical Association published ethical guidelines defining the boundary between deceptive and nondeceptive practices. These guidelines encourage free competition among health care providers and the dissemination of truthful information. They also declare four specific promotional practices to be deceptive. This case presents two questions relating to whether, in these circumstances, the Federal Trade Commission may impose a cease and desist order against the Association:

1. Whether the FTC has jurisdiction over nonprofit professional associations when Congress in 1914 prohibited the FTC from regulating an association unless it is "organized to carry on business for its own profit or that of its members" and when Congress in 1977 specifically declined to extend the agency's jurisdiction to nonprofit organizations?

2. Whether the FTC can condemn reasonable and responsible post-*Goldfarb* ethical guidelines without any analysis of their competitive consequences and subject the American Medical Association to a sweeping cease and desist order by seizing on obsolete pre-*Goldfarb* guidelines?

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## BRIEF FOR PETITIONERS

### OPINIONS BELOW[1]

The majority opinion of the Court of Appeals (Cert. App. 2a) and the dissenting opinion of Judge Mansfield (Cert. App. 23a) are reported at 638 F.2d 443 (2d Cir. 1980). The Opinion of the Federal Trade Commission (Cert. App. 312a) and the Initial Decision of the Administrative Law Judge (Cert. App. 37a) are reported at 94 F.T.C. 701 (1979).

### JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1980. The Court denied a timely petition for rehearing with suggestion for rehearing in banc on November 25, 1980. Cert. App. 375a. On February 17, 1981, Justice Marshall granted petitioners an extension of time to file their petition to and including April 8, 1981. The petition for certiorari was filed on that date and granted on June 22, 1981. The jurisdiction of the Court is based on 28 U.S.C. §1254(1).

[1]The statement required by Supreme Court Rule 28.1 is set forth at p. ii of the Joint Petition For A Writ Of Certiorari.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution and the pertinent provisions of sections 4 and 5(a) of the Federal Trade Commission Act, 15 U.S.C. §§44 and 45(a), are set forth in Appendix A hereto.

## STATEMENT OF THE CASE

This case involves a decision of the Federal Trade Commission which subjects three voluntary nonprofit medical associations to its jurisdiction and which condemns the ethical positions of the American Medical Association with respect to physician advertising, solicitation, and contract practice.

### A. Petitioners.

**The American Medical Association.** Petitioner American Medical Association ("AMA" or "Association") is a nonprofit corporation operating under the Illinois Not For Profit Corporation Act, Ill. Rev. Stat., ch. 32, §§163 *et seq.* The principal purposes of the Association are and have always been to advance medical science and education and to upgrade the health of the American people. J. App. 23-24. Since its founding in 1846, the Association has sponsored a vast array of educational, scientific, and public health programs, which the Commission found to be "a laudable public service." Cert. App. 319a. Currently, for example, the AMA participates in the accreditation of all levels of medical education. It disseminates health care information without charge to the public. It publishes scientific journals, books, and monographs. It evaluates the therapeutic efficacy of drugs. It sponsors programs related to mental illness, alcoholism, television violence, drug abuse, food and nutrition, and the quality of medical care in jails and prisons. Cert. App. 47a-70a.

The Association also provides ancillary services such as practice management seminars and insurance programs, which the Commission found to have "pecuniary benefit for its members." Cert. App. 318a. These services are miniscule in relation to the overwhelming educational and scientific activities of the Association. *See* J. App. 96. They provide no financial profit to the Association. It is the educational and scientific activities of the Association which indisputably constitute the vast majority of its programs and are the "heart and soul" of the organization, the reason for the AMA's existence. J. App. 87-88, 96.

Membership in the Association is entirely voluntary. Physicians are licensed by the state and are free to join or not join the Association as they see fit. They need not belong to the Association—or to any state or local society—to obtain licensure or specialty certification, practice medicine, secure malpractice insurance, or receive hospital staff privileges. Cert. App. 41a. As of December 31, 1974, only 52.6% of the licensed physicians in the United States were AMA members. *Id*. If a member violates the Association's ethical principles, including those challenged by the FTC, the maximum sanction is revocation of the physician's membership in the Association. *Id*. Notably, the Association has no power whatsoever over physicians who choose not to join and does not impose its ethical principles on non-members.

The Association is a federacy of independent and autonomous state medical societies. RX 2, p. 1. It does not control the policies or actions of these societies. Tr. 3950; RX 624. When the Association's legislative body, the House of Delegates, adopts a resolution, it becomes Association policy until modified or repealed. RX 544; Tr. 3969. AMA policy does not bind state or local medical societies, however. Tr. 3954-3956.

**The Connecticut Petitioners.** Petitioners Connecticut State Medical Society ("State Society") and New Haven County Medical Association, Inc. ("County Association") are voluntary

nonprofit professional associations under Connecticut law. Cert. App. 44a-45a. The State Society was chartered by the Connecticut legislature as a nonprofit scientific and professional association in 1792, fifty-four years before the founding of the AMA, for the purpose of administering degrees in medicine and promoting the public welfare and education. Cert. App. 44a; RCX 146. Throughout its history, the State Society has been active in scientific and educational matters. For example, it has numerous scientific sections and committees and holds an annual scientific assembly for the presentation and discussion of medical subjects. Cert. App. 105a-106a. It publishes a scientific journal, a sports medicine periodical, and informational booklets on health care topics. *Id.* at 109a-110a. In addition, it sponsors continuing medical education programs and cost-containment seminars open to all interested persons. *Id.* at 108a-109a. The County Association, founded in the late 1700's, focuses on local health care issues in the New Haven area. Its committees often function in an ombudsman capacity on behalf of community members having inquiries or complaints about medical care. Cert. App. 124a-125a; Tr. 8441-8474.

Neither the State Society nor the County Association is a chapter or subsidiary of the AMA. Each makes its own policies and has its own governing body. Cert. App. 44a-45a. Members of these associations are not required to become members of the AMA. *Id.* In fact, only about half of each association's members have chosen to join the AMA. *Id.* at 117a; Tr. 8244-45, 8439.

### B. The Ethical Standards of the American Medical Association.

This case focuses on the ethical standards of the American Medical Association. The basic set of ethical principles of the Association is a short statement of broad general precepts known as *The Principles of Medical Ethics*. These broad precepts are interpreted for AMA members by the Association's Judicial Council.

At all times relevant to this case, its interpretations were contained in a volume entitled *Opinions and Reports* of the Judicial Council. The *Opinions and Reports* are revised periodically to reflect changes in medical practice, social values, and law.[2] Cert. App. 244a.

The most recent edition of *Opinions and Reports* when this case was filed was the 1971 edition. Cert. App. 134a. That edition contained a number of ethical positions which had been developed over the first 125 years of the AMA's history. J. App. 25-55. While it did not ban the dissemination of information about physicians, the 1971 edition included positions which the FTC was able to characterize as almost an "absolute ban" on solicitation and physician advertising. Cert. App. 341a.[3] That edition also contained a number of archaic statements, made in response to conditions existing in the 1920's and 1930's, which restricted what the Commission has termed "contract practice." Cert. App. 343a-345a.

**The Post-*Goldfarb* Revisions.** On June 16, 1975, this Court held for the first time that the learned professions are subject to the Sherman Act. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Aware of the profound implications of that case and determined to comply with the antitrust laws, the Association took immediate action. In the fall of 1975, it began revising its ethical statements in light of *Goldfarb* and changing social values. Cert. App. 244a.

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[2]Most state and local medical societies, including the Connecticut petitioners, have adopted the *Principles of Medical Ethics* but *not* the *Opinions and Reports*. Thus, many state and local societies have taken positions on ethical matters, such as physician advertising, which are different from the AMA position. *See* Tr. 5765, 5845, 5928, 7534.

[3]The statements on advertising and solicitation in the 1971 edition originated at a time in which deceptive medical advertising was a major social problem. Quacks and charlatans skilled in public relations used sensational advertising and exaggerated claims of success to lure countless patients to needless tragedies. *See* Cert. App. 221a-222a.

On April 9, 1976, the Association issued a comprehensive statement on advertising and solicitation which sought to define the boundary between deceptive and non-deceptive practices. Cert. App. 379a-381a. This statement declares that dissemination of fee information and other useful information that will assist patients in making an informed choice among physicians is ethical:[4]

> "*Advertising.* The principles do not proscribe advertising. . . . Advertising means the action of making information or intention known to the public. The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.
>
> "The physician may furnish this information through the accepted local media for advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.
>
> "A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided."

The 1976 statement further declares that "solicitation" is unethical. Solicitation is narrowly and specifically defined to

[4]The AMA was the first professional association to take such a position. *See* J. App. 4.

cover four promotional practices which have a significant capacity to mislead patients. These are: (1) physician testimonials, (2) claims intended or likely to create inflated or unjustified expectations of results, (3) self-laudatory claims which imply that the physician has skills superior to other physicians with like training, and (4) advertisements containing incomplete or incorrect facts or representations that would cause the average person to be deceived. *See* Cert. App. 379a-381a.

The 1976 statement on advertising and solicitation was incorporated in a new edition of the *Opinions and Reports* published in March of 1977.[5] J. App. 71-86. The 1977 edition also deleted archaic positions on contract practice that had appeared in the 1971 edition. It states instead that physicians may ethically be employed on a contract basis but that they "should not be subjected to lay interference on professional matters and that their primary responsibility should be to the patients they serve." J. App. 80-81.

On June 27, 1977, this Court decided *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The Court stated that professional associations should play a "special role" in "defining the boundary" between deceptive and nondeceptive advertising. *Id.* at 383-384. It quoted at length from the AMA's position on advertising and solicitation. *Id.* at 369-370 n.20.

Since *Bates*, the AMA has continued to modify its ethical positions to reflect developments in law and social values. In 1980, it adopted a new set of *Principles* which eliminates all references to "solicitation." *See* Cert. App. 30a. In January of 1981, the Judicial Council issued a statement on advertising under the 1980 Principles which, *inter alia*, clarifies that the Association has no objection to nondeceptive advertising in mass media. *See* Appendix B hereto. This statement has been incorporated in *The Cur-*

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[5]Distribution of the 1971 edition had ceased approximately one year earlier. Cert. App. 245a.

*rent Opinions of the Judicial Council of the American Medical Association—1981*, published in March of 1981.

### C. Proceedings Below.

On December 19, 1975—after the AMA had begun reevaluating its ethical standards in light of *Goldfarb*—the Federal Trade Commission issued its complaint in this matter. It charged that petitioners had restricted the ability of their members to advertise and to enter into certain contractual relationships, in violation of §5(a) of the Federal Trade Commission Act. Cert. App. 33a-35a. The complaint represented the first time that the Commission had challenged the ethical precepts of a professional association. Yet it was issued without any investigation, without any attempt to ascertain petitioners' current positions or policies, and without any effort to determine whether formal proceedings were necessary to serve the public interest.[6]

In January of 1977—after the 1977 *Opinions and Reports* had been sent to the printer and well before trial of this case commenced—the AMA moved for reconsideration of the issuance of the Complaint. J. App. 1-9. The AMA pointed out that it had begun the process of voluntarily revising its ethical canons before the case was filed, had substantially revised its position on advertising and solicitation in April of 1976, and would soon be publishing a major new edition of *Opinions and Reports*. The Association further noted that *Bates*, which was then pending in this Court, was likely to clarify the role of the professions with respect to advertising. Thus the sole effect of proceeding with this action would be to interfere with the Association's voluntary compliance with evolving law. The Commission denied this motion.

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[6]Robert B. Reich, then Director of Policy Planning for the FTC, has observed: "Too often, we regulators act like sheriffs in the Wild West, shooting first with subpoena and injunction and asking questions later." *Business Week* (October 27, 1980).

Trial of the case extended from September of 1977 through May of 1978. The American Medical Association did not defend pre-*Goldfarb* positions contained in the 1971 edition of the *Opinions and Reports*. Cert. App. 340a. It emphasized that these positions, many of which dated back to the 1920's and 1930's, did not represent its current policies and that it had not enforced any restraints contained in the 1971 *Opinions and Reports*.[7]

Rather, the defense rested principally on two grounds. First, petitioners urged that the Commission may not regulate *bona fide*, nonprofit professional associations because §4 of the Federal Trade Commission Act precludes the agency from exercising jurisdiction over associations that are not "organized to carry on business" for their own "profit" or that of their members. Second, the AMA contended that its 1976 statement on advertising and solicitation and its 1977 position on contract practice satisfy the requirements of §5 of the Act because they have neither the purpose nor the effect of suppressing competition.

[7]On the contrary, the Judicial Council had approved physician advertising and contract practice in the only instance in which it considered these issues in the context of a specific case. *Matter of Ben E. Landess, M.D.* (1955); J. App. 17-22; *see* Cert. App. 137a. The AMA did object to attributing to it the enforcement actions of state and local medical societies. It demonstrated that it could not be held responsible for the disciplinary actions of these societies because they are autonomous organizations which form their own policies on ethical matters. Indeed, as to most of the incidents in the record, the AMA had no involvement whatsoever, apart from having published ethical guidelines which the local societies found persuasive. As to the other incidents, AMA staff responded to inquiries from state and local societies seeking advice about a particular matter. The AMA played no role, however, in the decision of the state or local society and never even attempted to find out if its advice had been followed. Citing *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304 (1925) and *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), the AMA urged that there was no basis for attributing the local actions to it. The Connecticut petitioners, noting their autonomy, asserted that they should not be held responsible for the actions of other medical societies and should be judged on their own actions. No member of these societies was ever disciplined for engaging in advertising, solicitation, or contract practice.

In this regard, the AMA made a detailed defense of its 1976 statement on advertising. The AMA introduced numerous examples of the types of advertisements that the 1976 statement was intended to discourage. J. App. 455-461. *See also* RX 690, 785, 799, 800, 811, 817. Medical experts testified that the practices condemned by the 1976 statement convey no information that would be meaningful in choosing a physician and have a substantial capacity to mislead. *See, e.g.*, J. App. 296-305; *see also* Tr. 6920-6999, 7031-7120. The testimony further demonstrated that a ban on the practices condemned by the 1976 statement would have no adverse effect on the price, quality, or availability of physician services, *see* Cert. App. 276a-277a, and was essential to preventing deception and promoting quality medical care. *See* J. App. 261-81; Cert. App. 140a.

The consumer testimony in the case abundantly demonstrated the terrible tragedy that can result from deceptive advertisements. *See, e.g.*, J. App. 401-421, 422-440, 441-453. The record includes, for example, the testimony of women who responded to seemingly innocuous ads in media such as "T.V. Guide" promoting various forms of cosmetic surgery. These ads featured testimonials by satisfied supposed former patients, alluring pictures of shapely women implying that those who underwent surgery would be made similarly beautiful, claims falsely implying that the advertiser's skill was superior to that of other surgeons, and a variety of other representations likely to deceive the average person, *e.g.*, statements that the ad was run by an organization with a humanitarian name such as "Women Who Help Women" when in fact the organization was simply a front for charlatans. *See, e.g.*, J. App. 457. In each instance, the woman chose her surgeon on the basis of the advertisement, often after having been advised by other physicians that cosmetic surgery was inadvisable in her case. These women testified how they were mutilated by the advertising surgeons—undergoing operation after operation under horrible conditions leaving them physically and psychologically

scarred for life. One woman testified how her daughter died at the hands of an advertising surgeon after having been turned down for surgery by three non-advertising physicians. J. App. 441-453.

**The Commission's Decision.** Following the initial decision by the administrative law judge,[8] the Commission held on October 12, 1979 that petitioners are subject to its jurisdiction and had violated §5 of the Federal Trade Commission Act. It entered a sweeping cease and desist order that prohibited the AMA from *inter alia:*

> 1. Involving itself in any way in the advertising practices of physicians unless those practices "would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act" (Order, Part I);
>
> 2. Involving itself in any way in the consideration provided to physicians for their services—regardless of how contrary to the public interest such consideration might be, *e.g.*, fee gouging and secret fee splitting arrangements (Order, Part IIA) (Cert. App. 369a-373a).[9]

On the jurisdictional issue the Commission agreed that petitioners are *bona fide*, nonprofit corporations engaged in scientific, educational, and public health programs. Cert. App. 319a. It nevertheless held that because it had found that some of petitioners' activities confer what it characterized as a pecuniary benefit on their members, these medical societies are subject to its jurisdiction. *Id.* at 318a.

On the merits, although the AMA had not defended pre-*Goldfarb* statements from the 1971 *Opinions and Reports*, the Com-

[8]The order recommended by the ALJ would have barred petitioners from publishing any ethical guidelines for two years and would have provided that petitioners could not publish a guideline thereafter without the prior approval of the Commission. Cert. App. 305a-308a.

[9]The Commission bound the Connecticut petitioners to this Order by requiring the AMA to disaffiliate any association that did not voluntarily agree to its substantive terms. Cert. App. 364a, 371a.

mission discussed these statements at length and held that they did not satisfy the rule of reason. Cert. App. 334a-350a. As to advertising, the Commission characterized the pre-*Goldfarb* guidelines as essentially an "absolute ban" on advertising, *id.* at 341a, and concluded that they "unreasonably impede competition." *Id.* at 342a. As to contract practice, the Commission held that the archaic positions in the 1971 *Opinions and Reports* constituted "an unreasonable restraint of trade." *Id.* at 344a.

Although basing liability exclusively on pre-*Goldfarb* statements, the Commission also rested its decision and order on its conclusion that the AMA's 1976 and 1977 ethical guidelines were insufficient to satisfy §5 of the Act, and that they demonstrated the "danger of permitting the medical profession broad discretion" in offering its members guidance concerning ethical matters. Cert. App. 350a-361a, 363a. The FTC condemned the AMA's 1976 statement on advertising and solicitation without any assessment of its effect on competition. Rather, through what it termed "exegesis," Cert. App. 354a, the Commission found that virtually every provision of the 1976 statement was somehow "worrisome" or otherwise deficient. *Id.* at 354a-358a. It also objected to the AMA's post-*Goldfarb* positions because the AMA had, in its view, taken insufficient steps to disavow their predecessors. *Id.* at 353a-354a.

The FTC concluded that the AMA's post-*Goldfarb* advertising guidelines provided "no assistance whatsoever in making the distinction" between deceptive and nondeceptive advertising. Cert. App. 358a. While disapproving the AMA's position as overly broad, the Commission announced that it itself was incapable of drafting new guidelines that distinguished deceptive from nondeceptive advertising by physicians with sufficient "precision". *Id.* at 362a.

As to contract practice, the FTC offered no objections to the 1977 positions. Cert. App. 358a. It nevertheless concluded that

the order must cover these practices as well because there had been no explicit indication prior to December of 1975 that the Association intended to revise the pre-*Goldfarb* contract practice guidelines. *Id.*

**The Court of Appeals' Decision.** A divided Court of Appeals for the Second Circuit upheld the Commission's decision to issue a cease and desist order.[10] On the jurisdictional issue, it rejected petitioners' claim that *bona fide*, nonprofit professional associations are outside the FTC's authority. It held that the Commission's jurisdiction to regulate petitioners was established by the finding that they served "business" as well as "non-business" interests of their members. Cert. App. 9a.

On the merits, the Court of Appeals concluded that it was proper for the Commission to rely upon the AMA's outdated, pre-*Goldfarb*, pre-*Bates* ethical guidelines to condemn the AMA's 1976 position on advertising and solicitation. Cert. App. 12a. It further held that "[i]n any event," the Commission had properly ruled that these positions "were insufficient" to satisfy the standards of §5 of the Federal Trade Commission Act. *Id.* at 16a. In so holding, the Court of Appeals explicitly approved the Commission's statement that the AMA's admonition against self-laudatory claims that "imply skills superior to those of other physicians with like training and experience" is overly broad because it bans self-laudatory advertising that is "fully accurate." *Id.* at 16a n.6.

Judge Mansfield dissented from the Court of Appeals' conclusion that petitioners had violated §5. He reasoned that the AMA's 1976 positions, as incorporated in the 1977 *Opinions and Reports*, "substantially comply with antitrust requirements," for they in-

[10]The Court modified the order to permit peer review of excessive fees and to allow the AMA to caution against advertising practices that it reasonably believes to be false or deceptive within the meaning of §5 of the FTC Act. Cert. App. 19a-21a.

dicate that dissemination of non-deceptive information is ethical and condemn "only certain deceptive promotional devices which clearly have a significant capacity to mislead." Cert. App. 27a. Judge Mansfield characterized the Commission's obsession with outdated pre-*Goldfarb* standards as "pressing for its pound of flesh" and engaging "in the futile business of beating a dead horse." *Id.* at 23a. He concluded that the entire proceeding was "unjustified, unnecessary, and a waste of administrative and judicial resources." *Id.*

## SUMMARY OF ARGUMENT

The decision and order of the FTC must be set aside for two reasons. First, nonprofit professional associations are not subject to the agency's jurisdiction. Second, even if the FTC has jurisdiction, its decision on the merits is a wholly unwarranted interference with responsible, evolving, and vitally important efforts by the AMA to protect patients from deception.

In contrast to the contemporaneously enacted Clayton Act and to the Sherman Act, the FTC Act does not apply to all associations. Congress carefully excluded from the FTC's jurisdiction any association that is not "organized to carry on business for its own profit or that of its members." The FTC Act thus does not reach all entities who are alleged to act anticompetitively. Rather, it is a limited grant of authority to an administrative agency to regulate the trade practices of entities and combinations of entities that were regarded as businesses in 1914.

Petitioners epitomize the kinds of organizations that are not subject to the jurisdiction of the Commission. They are not "organized to carry on *business*" within the meaning of the FTC Act. When the FTC Act was passed in 1914, associations of physicians were not treated as engaged in "business" and were not regarded as subject to antitrust statutes. Thus, they have been held to be

outside other antitrust statutes of limited jurisdiction and comparable vintage. *See, e.g., Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530, 552 (5th Cir. 1978). Nonprofit associations of physicians do not operate in the commercial marketplace and are not the sort of business enterprises in whose affairs the Commission was expected to have expertise.

Furthermore, petitioners are not "organized to" seek "*profit*" for themselves or their members. Each is organized and operates as a nonprofit corporation and devotes most of its operating revenues to scientific, educational, and public health programs. Although petitioners provide incidental economic benefits, membership in an organization which expends the bulk of its funds on scientific and educational activities simply cannot be regarded as a means of obtaining "profit," *i.e.*, gain over expenditure or investment.

On the merits, the Commission's fundamental error is that it disapproved the AMA's 1976 and 1977 guidelines without considering their impact on competitive conditions. *See National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). Instead, it applied a hypercritical "exegesis" characterized by outlandish misreadings and strained objections. If the proper antitrust analysis had been applied, the AMA's post-*Goldfarb* positions could only have been found to be lawful because they are reasonable ethical canons designed to prevent deception and patient exploitation. *Id. See Semler* v. *Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

The Commission argues, however, that it properly condemned the 1976 and 1977 statements without assessing their competitive consequences because it found that the Association's pre-*Goldfarb* guidelines are unlawful. This argument must be rejected for four reasons.

First, it was error for the Commission to enter any order based on obsolete pre-*Goldfarb* guidelines. Discontinued conduct can-

not be the basis for an order unless it "predicts the shape of things to come," *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952), and "there exists some danger of recurrent violation." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In view of the profound changes in professional regulation wrought by *Goldfarb* and *Bates* and in view of the AMA's continuing and responsible efforts to comply with these decisions, there is almost nothing more certain than that the Association will not revive antiquated pre-*Goldfarb* positions. In any event, it was error to leap from the conclusion that the 1971 guidelines were unlawful to a condemnation of the very different 1976 and 1977 positions without independent analysis of their competitive consequences.

Second, even if the Commission were correct that its analysis of the 1971 positions allows it to condemn the Association's post-*Goldfarb* statements without antitrust scrutiny, its hypercritical exegesis cannot be sustained. Its reading of these statements is so strained as to preclude any argument that it rationally assessed them. On the contrary, the extensive citation of these statements in *Bates*, 433 U.S. at 369-370 n.20, refutes the Commission's conclusion, Cert. App. 363a, that such statements "demonstrate" the danger of giving the AMA "discretion" in ethical matters.

Third, the decision to disapprove the post-*Goldfarb* guidelines without finding them to be anticompetitive is a flagrant violation of the principle that FTC decisions should not condemn legitimate practices. *Cotherman v. FTC*, 417 F.2d 587, 596 (5th Cir. 1969). The AMA did precisely what this Court in *Bates* and *Professional Engineers* encouraged professional societies to do: It carried out its "special role" in defining the boundary between deceptive and nondeceptive practices. Thus it took a stand against deceptive practices and their tragic consequences. Yet the Commission condemned this stand and established a test for judging ethical standards that even the FTC cannot satisfy.

Finally, disapproval of the 1976 and 1977 guidelines violates the First Amendment. Ethical canons that are reasonably designed to prevent deception are extremely valuable speech. Where, as here, such guidelines have been defended on the ground that they promote and do not subvert competition, the government cannot suppress them without making "authoritative findings" that to suppress them promotes a valid interest in preventing anticompetitive conduct. *See Central Hudson Gas & Elec. Co.* v. *Public Service Commission*, 447 U.S. 557 (1980).

## ARGUMENT

### I. THE FTC LACKS JURISDICTION OVER NONPROFIT PROFESSIONAL ASSOCIATIONS SUBSTANTIALLY DEVOTED TO PROMOTING SCIENCE, MEDICAL EDUCATION, AND THE PUBLIC HEALTH.

The holdings below that the FTC has jurisdiction over petitioners eviscerate a fundamental Congressional limitation on the jurisdiction of the FTC. Congress did not give the Commission authority over nonprofit professional associations which are predominantly devoted to educational, scientific, or charitable goals. On the contrary, the language and legislative history of the Federal Trade Commission Act demonstrate that Congress limited the Commission's administrative jurisdiction to for-profit business entities and combinations. The exclusive means of enforcing federal antitrust laws against other entities is actions in federal courts under the Sherman and Clayton Acts.

#### A. In Enacting The FTC Act In 1914, Congress Limited The Jurisdiction Of The FTC To Traditional Business Entities And Combinations Thereof.

The starting point in determining the scope of the FTC's jurisdiction must be the language of the FTC Act itself. *See Reiter* v.

*Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 5(a)(2) of the FTC Act provides that the Commission can institute administrative proceedings only against "persons, partnerships, or corporations." Section 4 of the Act carefully defines the "corporations" that are subject to the FTC's jurisdiction. Under these sections, an association is subject to the jurisdiction of the Commission only if it is "organized to carry on business for its own profit or that of its members."[11]

The language of §4 and §5 demonstrates that the FTC is an administrative agency of limited jurisdiction. The intention of the 63rd Congress in this respect is made even clearer by comparing the language of the FTC Act with the language of the contemporaneously enacted Clayton Act. *See United States* v. *American Bldg. Maintenance Industries*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together). The same Congress that limited the FTC's jurisdiction to associations "organized to carry on business for . . . profit" expressly made the Clayton Act, like the Sherman Act before it, applicable to *all* associations.[12] Juxtaposition of these statutes demonstrates conclusively that the FTC Act is not a "carefully studied attempt," like the Sherman Act or the Clayton Act, to bring within it every entity "whose activities might restrain or monopolize commercial intercourse." *See United States* v. *Southeastern Underwriters Ass'n*, 322 U.S.

[11]As originally enacted in 1914, §4 of the Act provided:

> " '*Corporation' means any* company or *association* incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, *incorporated or unincorporated*, without shares of capital or capital stock, except partnerships, *which is organized to carry on business for its own profit or that of its members*" (emphasis supplied).

[12]The Clayton Act (15 U.S.C. §12), like the Sherman Act (15 U.S.C. §7), applies to all "persons." Both these statutes define "persons" to "include" all "associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country." *See* 15 U.S.C. §§7, 12.

533, 553 (1944) (characterizing Sherman Act); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-788 (1975) (same).

By limiting FTC jurisdiction to associations organized for profit while making *all* associations subject to the Sherman and Clayton Acts, Congress excluded nonprofit professional associations from FTC jurisdiction and gave federal courts that enforce the Sherman Act exclusive antitrust jurisdiction over such associations. This conclusion finds support not only in the language, but in the legislative history as well. The FTC Act represented a radical departure from the traditional method of enforcement of the antitrust laws by federal courts. Its provision that the FTC shall enforce an exceedingly broad prohibition against "unfair methods of competition" represented an extraordinary delegation of power to an administrative tribunal.[13] This broad delegation to an administrative agency was the single most controversial point in the Congressional consideration of the legislation. Several members of Congress challenged the breadth and uncertainty of the prohibition as well as the idea of establishing yet another "roving commission to superintend or supervise, to oversee and police" business. 51 Cong. Rec. 11302 (Sen. Borah).[14]

Congress nevertheless made this delegation because of the widespread belief, shared by business[15] and consumer groups

[13]This Court recognized the breadth of this prohibition by holding that it allows the FTC to condemn conduct that is "unfair" in senses "beyond those simply enshrined in the letter or encompassed in the spirit of the antitrust laws." *FTC* v. *Sperry & Hutchinson*, 405 U.S. 233, 244 (1972); *see FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

[14]*See also, e.g.*, 51 Cong. Rec. 11108 (Sen. McCumber); 11110-12 (Sen. Lippit); 11113-18 (Sen. Reed); 11178-79 (Sen. Sutherland); 11181-83 (Sen. Thomas); 11186-88 (Sen. Borah); 12745 (Sen. Weeks).

[15]Business groups as diverse as the United States Chamber of Commerce, the Illinois Association of Manufacturers, the American Vehicle Association, the National Retail Merchants Association, and numerous individual manufacturing and industrial corporations testified in support of the Act. *See* Sen. Rep. No. 597, 63d Cong., 2d Sess. 13-14 (1914); Hearings on H.R. 12120 To Establish Interstate Trade Commission Before Comm. on Interstate and Foreign Commerce, H. Rep. 63rd Cong., 2d Sess. (1914).

alike, that existing judicial enforcement of the Sherman Act against industrial and commercial enterprises and combinations thereof had been inadequate. *See* S. Rep. No. 1326, 62d Cong., 3d Sess. 13 (1913); S. Rep. No. 597, 63d Cong., 2d Sess. 8-9 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 18-20 (1914). Congress expected that a Trade Commission would develop such unique expertise concerning industrial and commercial entities that it would be better able to apply national antitrust policy to them than would a court.[16] Accordingly, the whole thrust of the legislative history is that the Act was passed to apply to "industrial business" and specifically to manufacturers, dealers, and associations or other combinations thereof.[17]

This background explains the reason for the Congressional decision to exclude from the FTC's jurisdiction associations not "organized" to carry on "business" for "profit." Congress established this specialized agency to regulate, and develop expertise in, the conduct of those entities that had precipitated the legislation: industrial and commercial enterprises conducted for profit and combinations thereof. Section 4 of the Act thus limits the

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[16]The legislative history repeatedly emphasized the conviction of Congress that the Trade Commission would be "an administrative body of practical men thoroughly informed in regard to business," H.R. Rep. No. 1142, 63rd Cong., 2d Sess. 18-19 (1914), and would have unique expertise concerning "the business and economic conditions of . . . industry" S. Rep. No. 597, 63d Cong., 2d Sess. 8-9 (1914). The notion was that the FTC would have "a vast mass of information in numerous branches of industry" and "be in continual touch with the business organizations in the various industries." *Id.*

[17]*See, e.g.*, n.15., *supra*; S. Rep. No. 597, *supra*, at 11, 28; 51 Cong. Rec. 8840 (Rep. Covington) ("covers industrial business"); *id.* at 8851 (Rep. Stevens) (retailers and manufacturers discussed); *id.* at 8986 (Rep. Montague); *Community Blood Bank* v. *FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969) (quoting letter to Sen. Newlands discussing associations of manufacturers and dealers). As one of the managers of the Senate bill stated, the FTC Act was designed to create "a trade tribunal to assist in the administration of the [antitrust laws] respecting *general industry*." *Id.* at 11379 (Sen. Cummins) (emphasis supplied).

authority of the agency to these business entities. Congress recognized that there was no justification for subjecting other entities to administrative proceedings before an agency which would lack the broader perspective and safeguards of a federal court.

In 1977, Congress reaffirmed its 1914 decision to exclude non-business entities from the Federal Trade Commission Act. In that year, the FTC sought legislation to expand its jurisdiction to include nonprofit associations and organizations. It supported bills to this effect before the 95th Congress in both the House (H.R. 3816) and the Senate (S. 1288). The appropriate committees in each House, however, rejected the proposed amendment. They recognized, as the House Minority Report explained, that "the FTC does not have jurisdiction over non-profit organizations, nor should they." H.R. Rep. No. 95-339, 95th Cong., 1st Sess. at 120 (1977). The reasons for the rejection of the FTC's proposed amendment were succinctly summarized as follows:

> "Clearly the original FTC law was not intended to cover non-business activities. . . . [T]he agency has more than enough to do in regulating business concerns without the need to extend its jurisdiction to regulate non-business groups—groups which are completely different from business organizations in purpose, intent, and 'ownership.' . . . [D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the non-business activities of not-for-profit organizations that FTC regulation could have." Cong. Rec., October 13, 1977 (H. 33622) (remarks of Rep. Broyhill).

### B. Petitioners Are Not Subject To The Jurisdiction Of The FTC.

The AMA and the Connecticut petitioners epitomize the kinds of non-business entities that Congress did not subject to regulation by the FTC. Petitioners are associations of individual phy-

sicians, not of industrial corporations or dealers. They are organized neither to conduct *business* within the meaning of the 1914 Act nor to seek *profit* for themselves or their members. Rather, they are organized and operate as not-for-profit associations predominantly devoted to educational, scientific, and public health goals.

### 1. Petitioners Are Not Organized To Carry On Business Within The Meaning Of The FTC Act.

A statutory term must be construed in light of the circumstances existing at the time the statute was passed absent the clearest indication that Congress intended the meaning of the term to expand with changing times. *See Moor* v. *County of Alameda*, 411 U.S. 693, 709 (1973); *United States* v. *Wise*, 370 U.S. 405, 411 (1962). When the FTC Act was passed in 1914, Congress could not have intended to include professional associations within a class of corporations "organized to carry on *business*." At that time, persons engaged in the practice of medicine and other professions were simply not regarded as engaged in a trade or business subject to the antitrust laws. *See Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 436 (1932); *Goldfarb* v. *Virginia State Bar*, 497 F.2d 1, 13-15 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975); *cf. Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 786-87 (1975).

For this reason, courts have construed other antitrust statutes of limited jurisdiction and comparable vintage to exclude the professions. *See Feminist Women's Health Center* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978) (Wisdom, J.); *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974) (Breitel, J.). Judge Wisdom's opinion for the Fifth Circuit in *Feminist Women's Health Center, supra*, is most pertinent. There, the Court held that a physician was not a "person" within the meaning of a Florida statute, enacted one year after the FTC Act, which prohibits "anticompetitive conduct on the part of 'any person.' " 586 F.2d at 552. The Court reasoned that the Florida

legislature could not have intended in 1915 to treat physicians as engaged in "business" and subject to antitrust laws.

> "The statute . . . antedates by at least half a century the modern view that the learned professions are 'business' or 'commerce' just like any other for-profit endeavor. In light of the former popularity of the view that the learned professions were not 'trade', and therefore not subject to the federal antitrust laws . . . it seems unlikely that the 1915 Florida legislature thought that its anticombination statute comprehended the medical profession." 586 F.2d at 552; *accord*, *Matter of Freeman*, *supra*, 34 N.Y.2d 1 (holding lawyers are not subject to New York antitrust statute).

The legislative history of the FTC Act confirms that nonprofit associations of professionals are not within the ambit of the Act. It contains a number of statements evidencing Congressional concern with combinations of manufacturing corporations and other commercial or industrial organizations. *See* nn.15, 16, & 17, *supra*. Scores of representatives of such entities were among the over one hundred thirty witnesses who testified during the Congressional hearings on the issue of establishment of a Federal Trade Commission. *See* n.15, *supra*; S. Rep. 1326, 62nd Cong., 3d Sess., p. 1 (1913) (referring to 62nd Cong. hearings); Hearings Before Comm. on Interstate and Foreign Commerce On H.R. 12120 To Establish Interstate Trade Commission, H.Rep. 63rd Cong., 2d Sess. (1914). However, there is no reference anywhere in the legislative history to voluntary professional associations. This additional evidence is "most telling." *See American Textile Mfrs. Institute Inc.* v. *Donovan*, 49 U.S.L.W. 4720, 4726, 101 S. Ct. 2478, 2493 (June 17,1981); *Chicago Transit Authority* v. *Flohr*, 570 F.2d 1305, 1309 (7th Cir. 1977). Indeed, the fact that the FTC never sought to assert jurisdiction over such associations during the first sixty-one years of its existence is further proof of the point.

In short, the FTC Act was enacted to supplement the Sherman Act only in those areas of industrial and commercial business for

profit in which regulation by an administrative agency with business expertise was believed more desirable than judicial enforcement. There is no entity more clearly excluded from the FTC's limited jurisdiction than a nonprofit professional association. The market for medical and professional services presents problems "quite different than the usual considerations prevailing in ordinary commercial matters." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952). *See Goldfarb, supra*, 421 U.S. at 788 n.17. Thus Congress could not have thought in 1914 or anytime thereafter that the FTC would have any special ability to assess the conduct of nonprofit professional societies. In fact, Congress specifically rejected such a notion in 1977. For these reasons, nonprofit professional societies are outside the jurisdiction of the FTC.

**2. Petitioners Are Not Organized To Seek The Profit Of Themselves Or Their Members.**

In any event, no petitioner is organized for "its own *profit* or that of its members." Words in a federal statute are to be "interpreted as taking their ordinary, contemporary meaning" unless otherwise defined. *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The traditional and generally accepted meaning of the word "profit" is gain over and above expenditures or investment. *Community Blood Bank* v. *FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969). Entities are not treated as organized to carry on business for profit for themselves or their members unless they are organized to accumulate gain for distribution to shareholders or members. *Id.*[11]

[11]This test has been applied in determining whether an entity is "operated for profit" within the meaning of the Robinson-Patman Act, 15 U.S.C. §13c. *See Logan Lanes, Inc.* v. *Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir. 1967) (test is whether "any excess of revenue or expenses . . . is distributed to any private person or company as a profit"). It has also been invoked by the FTC under §4 of the FTC Act. *See Community Blood Bank*, 70 F.T.C. 728, 907 (1966) (traditional test of "carrying on business for profit" is whether an organization engages "in some undertaking for the purpose of realizing pecuniary gain which will ultimately be distributed to the shareholders or members").

The application of the statutory test of "profit" to petitioners is clear. Each petitioner is organized and operates as a nonprofit corporation. None accumulates gain for distribution to its members. In fact, while each has activities which incidentally benefit members, *e.g.*, insurance programs, each devotes its operating revenues largely, if not nearly exclusively, to educational, scientific and public health programs. For example, the AMA demonstrated below that 66.5% of its budget is devoted to promoting science, education, and the public health and that 25.8% is spent on administrative and organizational matters common to all nonprofit associations. J.App. 96. The Commission's own expert testified that in his opinion only 35-43% of the AMA's budget provides economic benefit to AMA members.[11] J. App. 188-189. These analyses abundantly demonstrate the truth of the testimony below that the AMA's scientific, educational, and public health programs are the "heart and soul of [the] organization [and that any] other things are embellishments." J. App. 87-88.

By no stretch of the English language can any petitioner be treated as "*organized* to carry on business for its own *profit* or that of its members." The Commission itself does not contend that petitioners operate for their own profit. The fact that the most substantial portion of their operating revenues is devoted to educational, scientific, and public health programs forecloses any argument that the petitioners are organized for the profit of their members. Were maximization of the profit of their members the goal of these organizations, they simply would not make such massive expenditures for these sorts of programs.

Although there may be incidental pecuniary benefits to membership, physicians no more join the AMA or local medical societies to obtain pecuniary profit than lawyers join the American Bar Association or local bar associations for this purpose. Rather

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[11] Approximately 90-95% of the State Society's expenditures were for administration and activities which even the Commission conceded provided no "pecuniary gain" to the Society's members. *See* RCX 68.

they join knowing that the bulk of their funds go to support the wide range of educational, scientific, and public health programs that are the "heart and soul" of these associations. Because the burden of defending FTC proceedings will divert substantial resources away from these programs, contrary to the intent of Congress, petitioners must be held to be outside the jurisdiction of the Commission.

### C. The Commission's And The Court Of Appeals' Interpretation of §4 Is Erroneous.

To justify the assertion of jurisdiction, the Commission and the Court of Appeals adopted a test in which they essentially ignore petitioners' nonprofit programs and ask instead whether some of their activities can be characterized as serving the business interests of members in some way.[20] Cert. App. 9a, 318a. This test is flatly inconsistent with the language and purpose of the statute. The statutory test is not whether members receive some "eco-

[20]The Commission has consistently sought to justify its assertion of jurisdiction over petitioners by referring to cases in which this Court and the parties apparently assumed that it had jurisdiction over a trade association. *See FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Millinery Creator's Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941); *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927). These cases do not establish that Congress intended, contrary to the language and legislative history of the Act, to subject professional societies to FTC jurisdiction if they incidentally further some pecuniary interest of their members. They simply reflect the Congressional intent to give the FTC authority over industrial and commercial businesses and their associations. To the extent that these cases establish, *sub silentio*, FTC jurisdiction over the particular trade associations involved, it necessarily is because each of these trade associations was in fact "organized to carry on business for its own profit or that of its members." Because trade associations of manufacturers or dealers have little other purpose than profit maximization for their members, the fact that the language of §4 was assumed to have been met is hardly surprising. However, because of the different, non-business nature of the professions and the eleemosynary goals of nonprofit professional societies, it does not follow that *bona fide* nonprofit professional societies are subject to FTC jurisdiction.

nomic benefit." Rather, it is whether an association is "organized" to "carry on business" for "profit," that is, whether it is devoted to producing gain in excess of expenditures. *See Community Blood Bank* v. *FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969). Organizations that are predominantly devoted to eleemosynary goals simply do not meet this test. For this reason, the Court of Appeals for the Eighth Circuit has refused to permit the FTC to exercise jurisdiction over a nonprofit hospital association and a community blood bank that indisputably served some business interests of their members. *Compare Community Blood Bank*, *supra*, 405 F.2d 1011, with *Community Blood Bank*, 70 F.T.C. 728, 863-64 (1966) (finding that blood bank and hospital association confer pecuniary benefits).[21]

In addition, the test applied by the Commission and the Court of Appeals would nullify the jurisdictional limitations in the FTC Act. Virtually every nonprofit organization confers some economic benefit on members. Even organizations like the NAACP, the Smithsonian Institution, and the American Judicature Society sponsor programs or activities which serve the pecuniary interests of their members.

Finally, there is nothing anomalous about the Congressional decision to exclude nonprofit professional societies from FTC jurisdiction. The Sherman and Clayton Acts provide authority for antitrust proceedings against these entities in federal court, and the States extensively regulate the professions. The whole point of the exclusion of nonprofit professional societies from the FTC's

[21]This is not to say that the Commission is bound by the mere form of incorporation. The Commission is free to examine any entity and engage in a process of "classification" to determine whether it operates in law and fact as a nonprofit corporation. *Community Blood Bank*, *supra*, 405 F.2d at 1018; *Ohio Christian College*, 80 F.T.C. 815 (1972) (nonprofit corporation found to be mere "shell" for individual entrepreneur "to further his own finance and comfort"). But where, as here, an association is genuinely nonprofit, the Commission's inquiry is at an end. The organization is exempt from its jurisdiction.

jurisdiction was to spare them the burden of administrative proceedings before an agency without expertise in their affairs. If the Commission believes that this exclusion creates a deficiency in its jurisdiction, "the cure must come from Congress, not by judicial enlargement of the statute." *Heater* v. *FTC*, 503 F.2d 321, 327 (9th Cir. 1974). *See Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617, 618 (1944); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 355 (1941).

## II. THE COMMISSION IMPROPERLY CONDEMNED THE ASSOCIATION'S ETHICAL STATEMENTS ON ADVERTISING, SOLICITATION AND CONTRACT PRACTICE.

The decision on the merits illustrates why nonprofit professional associations should be excluded from the jurisdiction of the Commission. The FTC decision is a wholly unwarranted interference with the evolutionary process by which the medical profession develops responsible ethical guidelines to combat deception. It could only have been made by an administrative agency with no expertise in or understanding of the practice of medicine or the market for physicians' services.

As this Court has recognized, ". . . there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than usual considerations prevailing in ordinary commercial matters." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952). This Court was aware that effective medical care depends on this "direct relationship."[22] Medical diagnosis often requires the patient to trust the physician sufficiently to confide highly personal and sensitive information. Medical treatment often requires

[22]Justice Jackson observed that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." *Id.* at 336.

the patient to trust the physician sufficiently to undergo procedures which can be exceedingly lengthy, painful, dangerous, and expensive—sometimes without yielding any apparent results.

Recognizing the fundamental importance of the physician-patient relationship, the medical profession has endeavored since the time of Hippocrates to establish ethical standards that are designed to assure that physicians will provide the highest quality of care and will not exploit or deceive patients. *See* Etziony, *The Physician's Creed* (1973). Of course, ethical guidelines change over time to reflect advances in medical knowledge and technology, evolution in social values, and developments in the law. Always, however, their goal is to "serve the purpose for which the profession exists, *viz.* to serve the public." *Boddicker* v. *Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1977).

Ethical guidelines designed to combat deception help advance the trust relationship on which effective medical care depends.[23] In addition, they guard against exploitation of patients whose inability to evaluate medical claims and whose vulnerability to promises of cure make the possibilities for deception great. Thus nearly fifty years ago this Court stated:

> "The Community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief." *Semler* v. *Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

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[23]As the late Michael Halberstam, M.D., a practicing physician in Washington, cogently observed, the physician has a responsibility as a professional not only to treat patients but to turn patients away when treatment would be inappropriate J.App. 261-281. Deceptive practices designed to produce a large flow of patients without regard for the advisability of treatment are inconsistent with this "gate-keeper" function. If such practices become an accepted part of physician advertising, the public will cease to regard physicians as professionals worthy of trust—as the experience of plastic surgeons in California demonstrates. *See, e.g.*, testimony of John Goin, M.D., Tr. 6935-6936.

At issue in this case are ethical standards designed to combat deception and, more specifically, changes that were made in those standards to reflect an evolution in legal and social norms occurring in the mid-1970's. In 1975, this Court decided for the first time that the professions are subject to the antitrust laws. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). At approximately the same time, the historic position that advertising by professionals was socially undesirable was changing.

Previously, all professional advertising had long been thought to be inherently misleading because it could not adequately convey the quality of services performed by the advertiser and because patients were not sophisticated enough to evaluate medical claims. *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 391 (1977) (Powell J., dissenting). Thus, as recently as 1975, many state statutes banned or placed severe restrictions on advertising by physicians. Cert. App. 311a-312a. Numerous judicial decisions supported prohibitions on physician advertising. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 490-491 (1955); *Davis* v. *State*, 186 Md. 385, 37 A.2d 880, 885-886 (1944); *In re Connelly*, 18 A.D. 466, 240 N.Y.S.2d 126 (App. Div. 1963). During the mid-1970's, however, certain forms of advertising by professionals were coming to be viewed as a means of making important information more widely known. *See Bates* v. *State Bar of Arizona*, *supra*; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976).

Responding to and anticipating these profound developments, the American Medical Association acted promptly. In the fall of 1975—before the complaint in this action was filed—the Association undertook a major review of its ethical pronouncements. *See* pp. 5-8, *supra*. This review led on April 9, 1976, over a year before *Bates*, to the issuance of a comprehensive new statement on advertising and solicitation by physicians. This statement declares in essence that dissemination of non-deceptive information, including fee information, which will help enable patients to make

an informed choice among physicians is ethical, but that narrowly defined promotional practices with a serious potential to mislead are unethical. The review process continued in 1977 when the Association published an entirely new edition of the *Opinions and Reports* of the Judicial Council which, *inter alia*, deleted all archaic statements on contract practice.

The Federal Trade Commission, however, was neither interested in nor satisfied with this evolutionary process and with the AMA's voluntary compliance with changing law. The Commission insisted, as Judge Mansfield later observed, "on pressing for its pound of flesh." Cert. App. 23a. It was blind to the present and obsessed with the past. It determined to adjudicate the validity of obsolete, pre-*Goldfarb* statements which the Association had no interest in defending and had repeatedly disavowed. In the process, it brushed aside the AMA's post-*Goldfarb* positions, entered a sweeping order against the Association, and disdainfully disapproved the 1976 statement on physician advertising although that statement had been quoted by this Court in *Bates*, *supra*, 433 U.S. at 369-370 n.20.

Obviously, something has gone wrong in a system which has traditionally valued professional self-regulation and sought to minimize government intervention in that process. What went wrong is that the Commission refused to respect the AMA's responsible efforts to comply with law. It did not subject the Association's post-*Goldfarb* positions to proper antitrust scrutiny. Instead, the Commission condemned these statements on the basis of a strained and hypercritical process which it termed "exegesis."

The Commission's disapproval of the Association's ethical standards ignored the importance of responsible professional self-regulation to the public welfare. Further, the Commission made its decision without regard for the fact that publication of responsible ethical guidelines is extremely valuable speech which must

not be suppressed without the most compelling reason. For all these reasons, the decision and order of the Commission should be set aside.

### A. The Commission's Disapproval Of The AMA's Post-*Goldfarb* Positions Is Inconsistent With The Antitrust Laws.

In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978), this Court held that a tribunal called upon to adjudicate an antitrust challenge to an ethical canon addressing professional deception is confined to considering its "impact on competitive conditions." Yet the Commission disapproved the AMA's 1976 and 1977 statements on advertising, solicitation, and contract practice without even considering whether they have the purpose or effect of suppressing competition. It made absolutely no inquiry into the effect of these statements on the price, availability, or quality of physicians' services.

Rather, the Commission engaged in an extended analysis of obsolete, pre-*Goldfarb* statements which the Association did not defend and which Judge Mansfield properly characterized as a "straw-man." Cert. App. 31a. Having found the pre-*Goldfarb* "straw-man" unlawful, it proceeded to condemn the AMA's actual position on advertising and solicitation simply by characterizing the specific guidelines as "overbroad," "troublesome," or "worrisome" on the basis of highly strained, patently unreasonable, and, in some instances, outlandish interpretations.[24] Cert. App. 354a-358a.

Many of the Commission's objections to individual guidelines are based on simple misreadings of their terms. For example, the

[24]The Commission entered an order with respect to the AMA's post-*Goldfarb* positions on contract practice without any analysis of these positions whatsoever. To the extent that it mentioned these positions at all, it acknowledged that "the discussion of contractual relationships and free choice contained in the 1977 *Opinions and Reports* represents a significant improvement over earlier versions." Cert. App. 358a.

Commission erroneously states that the guideline directed against claims that "are self-laudatory *and* imply that the physician has skills superior to other physicians engaged in his field or specialty of practice" is a ban on "all forms of comparative advertising, no matter how truthful." *Id.* at 355a. In fact, the statement is concerned only with non-verifiable, self-laudatory claims that imply that the physician has skills superior to other physicians with the same specialty. In this context, the Commission appears specifically to have rejected the AMA's position, which later found support in *Bates*, that "claims as to the quality of services" are unethical where these claims "are not susceptible of measurement or verification" and therefore are "so likely to be misleading as to warrant restriction." *Bates*, *supra*, 433 U.S. at 383-384.

The FTC's objections to other guidelines are so strained as scarcely to warrant comment. For example, the Commission detected a "worrisome" "overbreadth" in the guideline cautioning against claims containing "incomplete facts . . . likely to cause the average person to misunderstand or be deceived." Cert. App. 356a. The FTC disapproved this position for not stating that immaterial facts can be omitted from advertising and for raising a "spectre of lengthy, burdensome disclosures." *Id.* In fact, a materiality requirement is obviously implicit in the AMA's position. The FTC's additional objection that the position makes no explicit provision for "representations directed to a sophisticated group of consumers" is equally strained. *Id.*

Through similar "exegesis," the Commission faulted every other aspect of the 1976 statement.[25] It concluded that the Association's stance against physician testimonials is unacceptably

[25]The Commission also faulted other statements on physician advertising contained in the 1977 *Opinions and Reports*. Thus, for example, to make sure that patients are not misled into believing that famous physicians with limited ties to the advertiser will be routinely available, the

*(Footnote continued on next page)*

overbroad. *Id.* It characterized as "troublesome" the proscription of claims containing "incomplete facts." *Id.* Finally, it saw "danger" in the "apparent overlap" between the position against claims containing "incomplete facts" and those "likely to create inflated or unjustifiable expectations of favorable results." *Id.*

The test under the antitrust laws, however, is not whether ethical guidelines closely resemble the ones that the FTC would write if it were capable of drafting them with sufficient "precision"—which even it admits it is not. *See* Cert. App. 362a. The "true test of legality" is whether the canon is "one which promotes competition or one that suppresses competition." *Professional Engineers, supra*, 435 U.S. at 691. As this Court has recognized, ethical guidelines reasonably designed to prevent professional deception are valid under the antitrust laws. "[T]he problem of professional deception is a proper subject of an ethical canon." *Professional Engineers, supra*, 435 U.S. at 696.

Properly analyzed under the correct test, the post-*Goldfarb* positions of the AMA are lawful. As Judge Mansfield stated, Cert. App. 26a-28a, the 1976 position of the Association on advertising and solicitation has the purpose and effect of promoting, not subverting, competition. The whole point of the position is to "discourage abusive practices that exploit patients . . . and interfere

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*(Footnote continued from previous page)*
AMA took the position that "HMO or prepaid health care plan advertising may not identify any particular physician unless the entire roster of physicians is disclosed." Cert. App. 357a. The Commission objected to this position because it believed that a simple disclaimer that the advertised physician would not be available would suffice. *Id.* It ignored the fact, however, that such a disclaimer neither undoes the effect of highlighting the name of one physician nor gives information that might really assist the patient in making a choice among health care plans —namely, the identities of the practitioners comprising the pool from which the subscriber's physician will be drawn. Moreover, the Commission gave no weight to the fact that the AMA position is based on a federal policy against identifying individual physicians in HMO advertising. *See* 42 U.S.C. §300e-10(b).

with freedom in making an informed choice of physicians and free competition among physicians." J. App. 82-84. The AMA statement is based on the fact that competition flourishes when patients receive accurate information enabling them to choose among physicians. Thus, it indicates that the "dissemination of nondeceptive information, including fee information is ethical."[26] Cert. App. 27a.

At the same time, the AMA position recognizes that competition is impeded when consumers receive deceptive information. Thus it discourages four promotional practices with a significant capacity to mislead. Specifically, testimonials for physicians are generally based on anecdotal evidence and tend to deceive by implying that the testimoniant's experience will be duplicated by other patients when in fact, because of the variety and complexity of symptoms, diseases, and treatments, this is not the case. Advertisements which are likely to create inflated expectations of favorable results give no meaningful information on which to choose a physician and appeal instead to anxiety and fear. Self-laudatory statements implying that a physician has superior skills are incapable of verification and are likely to be based on unsupportable data. Finally, advertisements which contain incorrect or incomplete facts or representations likely to deceive the average person are misleading by definition. *See* J. App. 296-305.

Likewise, the Association's 1977 statement on contract practice fully complies with antitrust requirements. The position that physicians may ethically be employed on a contract basis by HMOs or other prepaid health plans, but that they "should not be subjected to lay interference on professional matters and that their primary responsibility should be to the patients they serve,"

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[26]The guidelines provide that a physician may furnish this information through any accepted local media. In January of 1981, the Judicial Council clarified that these media include newspapers, radio, and television. *See* Appendix B, *infra*.

*see* J. App. 80-81, cannot suppress competition. Indeed, the Commission does not attempt to argue to the contrary. *See* Cert. App. 358a.

### B. The Commission's Disapproval Of The AMA's Post-*Goldfarb* Positions Cannot Be Justified On Any Theory.

There is no independent basis for holding the AMA's post-*Goldfarb* positions unlawful under proper antitrust standards. The Commission attempts to argue, therefore, that its condemnation of these positions is somehow justified by its finding that the Association's pre-*Goldfarb* statements are unlawful. This argument is untenable for four independent reasons.

#### 1. The Commission's Decision To Base Liability On Pre-*Goldfarb* Statements Does Not Justify Disapproval Of Post-*Goldfarb* Positions.

First, it was error for the Commission to rest its determination of "liability" on the pre-*Goldfarb* guidelines. These guidelines, of course, had been developed over the course of a long period in which the learned professions were thought not to be subject to the antitrust laws and in which judicial decisions and the law in most states indicated that advertising of services by professionals should be severely restricted. *See* pp. 22, 30, *supra*. It is undisputed that when this Court held in *Goldfarb* that the learned professions are subject to the Sherman Act, the AMA began revising its ethical guidelines before the FTC complaint was filed. Cert. App. 244a-245a. The AMA's new guidelines were reasonably designed to prevent deception. *See* pp. 5-11, 30-35, *supra*.

Because the sole purpose of an injunction is to prevent future violations of law, discontinued conduct cannot be the basis of a

coercive order unless it "predicts the shape of things to come," *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952), and "there exists some danger of recurrent violation." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The finding of a past violation of the FTC Act is insufficient to justify entry of any prospective order absent a cognizable likelihood that such violation will recur. *TRW, Inc.* v. *FTC*, 647 F.2d 942, 954 (9th Cir. 1981); *SCM Corp.* v. *FTC*, 565 F.2d 807, 812-813 (2d Cir. 1977).

The Commission's principal justification for its reliance on the 1971 *Opinions and Reports* is that it believes that the AMA never rescinded those statements. Cert. App. 353a.[27] This is nonsense. This Court and other courts have all recognized that the 1976 statement represents the AMA's position. *See Bates*, *supra*, 433 U.S. 369-370 n.20; *Health Systems Agency* v. *Virginia State Board of Medicine*, 424 F.Supp. 267, 274-76 (E.D. Va. 1976). The undisputed evidence demonstrates, moreover, that it is well accepted in the medical community that a new edition of the *Opinions and Reports* supersedes the previous edition (Tr. 3984). Furthermore, the first page of the 1977 edition specifically states that items from the 1971 edition had been withdrawn because, *inter alia*, "they did not adequately reflect current conditions of medical practice or legal requirements." J. App. 71-72. Since April of 1976, anyone inquiring of the Association with regard to advertising or solicitation has been provided with a copy of the Judicial Council Statement of April 9, 1976 (Tr. 4348, RX 532-534, 536-

[27]The Commission also believes it somehow relevant that the 1976 statement cautions that other medical associations and various states might take positions more restrictive than that of the AMA. Cert. App. 357a. The short answer to this point is that in 1976, a year before *Bates*, other associations and laws in many states did impose greater limitations on advertising than the AMA's guidelines did and that the responsible course was to advise physicians of this fact. In any event, however, if this caution has any significance, it should have been taken into account in assessing the competitive effect of the 1976 statement.

542, 545, 547-554).[28] In short, there is no cognizable danger of recurrent violation sufficient to justify entry of any cease and desist order.

Indeed, in light of the profound changes wrought in professional self-regulation by this Court's decisions in *Goldfarb*, *Bates*, and *Professional Engineers*, it is almost ludicrous to suggest that there is a cognizable danger that the AMA will revert to its pre-*Goldfarb* positions and issue guidelines that totally ban advertising or prohibit underbidding by physicians. In fact, because the AMA has continued to refine its ethical positions over the last five years, *see* Appendix B, any challenge to pre-*Goldfarb* guidelines has long been moot. *See County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979) (fact defendant had affirmatively adopted new hiring policies and followed them over five years mooted case on appeal).

In recognition that *Goldfarb* and *Bates* were watersheds, comparable challenges to pre-*Goldfarb* practices of professional societies have uniformly been withdrawn or dismissed even where, as is not the case here, the society did not begin to modify or withdraw its position until after the complaint was filed.[29] *See United States* v. *Oregon State Bar*, 405 F.Supp. 1102 (D. Ore. 1975) (challenge to fee schedule dismissed); *United States* v. *American Bar Ass'n*, No. 76 C 3475 (N.D. Ill.) (Justice Department voluntarily dismissed challenge to restrictions on lawyer

[28]Other FTC arguments proceed from the fact that the 1977 *Opinions and Reports* used some of the same terms as had the pre-*Goldfarb* positions. The 1976 statement on advertising continues, for example, to use the term "solicitation." It also "reaffirms" the AMA's long standing position that "solicitation" is unethical but that advertising is not. Although these arguments are so strained as scarcely to require a response, the short answer is that they provide no indication that the AMA would revive pre-*Goldfarb* ethical standards. At most, these considerations are relevant to an assessment of the competitive effects of the AMA's post-*Goldfarb* guidelines.

[29]The FTC itself dropped its investigations of ethical standards relating to advertising by the veterinary and accounting professions after those standards were changed. FTC File Nos. 762 3074, 772 3025.

advertising); *cf. W. T. Grant Co., supra* (complaint dismissed when practice abandoned after complaint filed).

The Commission should not have based an order on antiquated statements contained in the 1971 *Opinions and Reports*. To leap from the conclusion that those outdated statements violate §5 to a condemnation of the AMA's very different, post-*Goldfarb* positions is even more utterly unwarranted. In view of the fundamental legal developments that had taken place between 1971 and 1977 and the comprehensive changes that the AMA made to comply with evolving legal and social norms, it was error for the Commission not to make an independent analysis of the competitive significance of the AMA's post-*Goldfarb* positions. *See American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir. 1980).

### 2. Even If Antitrust Analysis Of Post-*Goldfarb* Positions Is Not Required, The Commission's "Exegesis" Of Such Positions Is So Strained As To Be Unsupportable.

The decision to condemn the AMA's 1976 statement on advertising and solicitation cannot be supported even if the Court of Appeals were correct that the Commission was required only to "rationally" assess them. Cert. App. 17a. The Commission's criticisms are based on such patent misreadings of the positions taken in that statement and are so strained that they simply cannot be regarded as fair or rational. *See* pp. 32-34, *supra*.

The extensive citation of the AMA statement in *Bates*, 433 U.S. at 369-370 n.20, demonstrates the point. The Court did not, of course, engage in an extensive analysis of that statement or expressly approve it. It is unlikely, however, that the Court would have quoted it at length if there were the slightest substance to the Commission's assertions that the guidelines "provide no assistance whatsoever in distinguishing" nondeceptive from deceptive

practices, Cert. App. 358a, reflect a "negative attitude" toward physician advertising, *id.* at 357a, or establish "the danger of permitting the medical profession broad discretion to proscribe unfair practices." *Id.* at 363. The Commission's assessment of the AMA statement is so flawed that it taints the entire decision.

### 3. Condemnation Of The AMA's Post-*Goldfarb* Positions Defies *Bates* And *Professional Engineers* And Undermines Responsible Professional Self-Regulation In The Public Interest.

The FTC's decision to condemn the 1976 guidelines when it neither found nor had any basis for finding that the guidelines are anti-competitive is a flagrant violation of the principle that an FTC decision may "not be drawn so broadly that it will cover legitimate practices." *Cotherman* v. *FTC*, 417 F.2d 587, 596 (5th Cir. 1969) (Wisdom, J.). The AMA's reasonable and responsible efforts in 1976 and 1977 to formulate ethical guidelines to protect the public from deception are not only legitimate, *see Professional Engineers*, *supra*, 435 U.S. at 696, but should be encouraged. *See Semler* v. *Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

The Commission's decision is blatantly at odds with the statement by this Court that the professions "have a special role to play" in "defining the boundary between deceptive and nondeceptive advertising" and in assuring that advertising by professionals "flows both freely and cleanly." *Bates*, *supra*, 433 U.S. at 384. The AMA did precisely what this Court encouraged professional societies to do: It applied the knowledge and expertise of its members to issue ethical guidelines reasonably "defining the boundary between deceptive and nondeceptive advertising." Yet the Commission undercut these efforts, entered a sweeping order, and broadly condemned the 1976 statements. It declared that "[a]cross-the-board bans on entire categories of representations" are "highly suspect," Cert. App. 362a, and conceded that even it

could not frame acceptable guidelines on deceptive advertising by physicians with sufficient precision. *Id.*[30] The assault on *Bates* and *Professional Engineers* could hardly be clearer. The Commission's decision will effectively preclude professional associations from establishing ethical norms of general applicability or offering meaningful guidance concerning deceptive practices.

Because ethical guidelines play an important role in discouraging deception, the Commission's condemnation of the AMA's post-*Goldfarb* positions and comparable across-the-board guidelines can only lead to the kind of tragic consequences that *Bates* had sought to avoid.[31] The record in this case contains numerous examples of individuals who, vulnerable to superficially appealing promises or suggestions of cure, were lured through deceptive advertising to unscrupulous physicians and terrible tragedies. *See, e.g.*, J.App. 401-421, 422-440, 441-453. If the Commission's approach is upheld and the medical profession is forced to abdicate the field to a government agency which itself acknowledges its inability to draft precise guidelines, the real loser will be the public—often the poor or unsophisticated. For it is they who will be drawn to incompetent practitioners by the meaningless testimonials, inflated promises, non-verifiable claims of superiority, and outright lies that the AMA's 1976 statement had

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[30]The Court of Appeals' modification of the FTC order to allow the AMA to promulgate guidelines it "reasonably believes" are directed at practices that are false and deceptive does not give the AMA any greater latitude. In light of the Commission's and Court of Appeals' decisions, the AMA cannot have reason to believe that the 1976 canons or similar guidelines will suffice.

[31]Of course, as a voluntary association comprised of only slightly more than half the physicians in the United States, the AMA cannot stop all deceptive practices by physicians or the tragedies that result therefrom. What the Association can and should do, however, is halt any such practices by its members and promulgate ethical positions which create a climate discouraging exploitive practices and alert regulatory officials to the sort of practices that are deceptive. The Commission's actions completely undermine such efforts. *See, e.g.*, Tr. 7054-56, 7076-77.

condemned.[32] *See* J. App. 454-461. Surely human life and health are too precious to permit such a result.

### 4. Condemnation Of The AMA's Post-*Goldfarb* Positions Without Proper Antitrust Scrutiny Violates The First Amendment.

Finally, to disapprove ethical guidelines without assessing their competitive significance violates the First Amendment. An ethical guideline that reasonably distinguishes deceptive from non-deceptive advertising is extremely valuable speech. It affords responsible advertisers norms against which to judge their promotional practices, helps protect the public from the unscrupulous, and gives guidance to courts, legislators, and regulatory officials.

An ethical guideline defining deceptive practices does not propose a commercial transaction or tout a particular product or service. *See Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 562-63 n.5 (1980). Rather, it constitutes the opinion of the profession on matters of extreme public interest and importance. *See Semler, supra*, 294 U.S. at 612 (what is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards). Accordingly, such a guideline is not commercial speech but ideological speech which "lies at the heart of the First Amendment protection." *First National Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978). *See Metromedia, Inc.* v. *City of San Diego*, 49 L.W. 4925, 4929-30, 101 S. Ct. 2882 (July 2, 1981) (Plurality Opinion of White, J.). Even if considered commercial speech, however, ethical guidelines are entitled to protection against ill-considered government action. *See Central Hudson Gas, supra*, 447 U.S. at 561-562.

[32] The record contains uncontradicted evidence that the states lack the resources and expertise to police deceptive physician advertising effectively and that professional self-regulation is vital to preventing deception. *See* Testimony of Robert C. Derbyshire, M.D., former president of the Federation of State Medical Boards of the United States; Cert. App. 140a.

Groups of professionals who have freely and voluntarily associated together must be given substantial "breathing space" to promulgate reasonable ethical guidelines. *In re Primus*, 436 U.S. 412, 436 (1978). The Commission, however, severely constricted that breathing space. It stressed that the AMA's post-*Goldfarb* statements underline "the danger of permitting the medical profession broad discretion to proscribe unfair practices." Cert. App. 363a. It disapproved these statements without any analysis of their competitive consequences—solely on the basis of hypercritical "exegesis" which no ethical canon could survive. *See* pp. 33-34, *supra*. It condemned these statements merely because it disliked the Association's positions. This sort of government condemnation of speech is repugnant to the First Amendment. *See Consolidated Edison Company* v. *Public Service Commission*, 447 U.S. 530, 536 (1980).

The First Amendment dictates that in even fashioning remedies, the FTC go no farther in restricting speech than absolutely necessary. *Standard Oil Co. of California* v. *FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 618-619 (3d Cir. 1976). Even commercial speech may not be suppressed unless suppression "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." *Central Hudson Gas* v. *Public Service Commission*, *supra*, 447 U.S. at 556. Here, the sole legitimate governmental interest is the prevention of anticompetitive conduct. This interest is not advanced by condemning speech which has not been demonstrated to have anticompetitive effects and which in fact promotes competition. *See* pp. 34-36, *supra*. In any event, disapproval of ethical statements responsibly made in light of *Goldfarb* and cited extensively in *Bates* certainly goes far beyond what is necessary to assure that the Association will not engage in anticompetitive conduct.

*Central Hudson* is analogous. There, a regulatory agency entered an order condemning speech ostensibly in order to advance

a valid regulatory goal, the conservation of energy. The suppressed speech included information that the speaker had claimed "would cause no net increase in total energy use." 447 U.S. at 570. This Court struck down the order because the agency had not made "authoritative findings" that its restriction of that speech would promote the valid interest in conservation. *Id.* In addition, the Court held that the order could not be approved because the agency had not demonstrated that "its interest" could not be "protected adequately by more limited regulation. . ." *Id.* at 570-571.

Similarly here, the Commission has made no "authoritative findings" that the AMA's post-*Goldfarb* positions are anticompetitive even though the issue was litigated at great length. Neither has it shown that its sweeping rejection of those positions is necessary to protect against conduct violative of the antitrust laws. Particularly since the ethical canons at issue here are ideological rather than commercial speech, the Commission's actions must be found to violate the First Amendment.

In 1976 and 1977, members of the American Medical Association exercised their First Amendment rights. They made statements on advertising, solicitation, and contract practices which were designed to combat deception and promote quality medical care. In so doing, they endeavored to achieve the transcendent end of all professions, to serve the public. *See Boddicker* v. *Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1977). The Federal Trade Commission should not be permitted to stop this effort by a voluntary association of physicians to carry on the finest traditions of professionalism.

## CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals should be reversed and the decision of the Federal Trade Commission should be set aside.

Respectfully submitted,

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# APPENDIX A

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Pertinent Provisions of the Federal Trade Commission Act, 15 U.S.C. §§41, *et seq.*

Section 4, 15 U.S.C. §44:

> "Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
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> * * *
>
> " 'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest; and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.
>
> * * *"

Section 5(a), 15 U.S.C. §45(a):

> "Sec. 5 (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> "(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3),

common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

# APPENDIX B

## STATEMENT ON ADVERTISING AND PUBLICITY FROM THE CURRENT OPINIONS OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION - 1981

"There are no restrictions on advertising by physicians except those that can be specifically justified to protect the public from deceptive practices. A physician may publicize himself as a physician through any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television or other advertising) provided that the communication shall not be misleading because of the omission of necessary material information, shall not contain any false or misleading statement, or shall not otherwise operate to deceive.

"The form of communication should be designed to communicate the information contained therein to the public in a direct, dignified and readily comprehensive manner. Aggressive, high pressure advertising and publicity may create unjustified medical expectations. Any advertisement or publicity, regardless of format or content shall be true and not misleading.

"The communication may include the following: (1) the educational background of the physician; (2) the basis on which fees are determined (including charges for specific services); (3) available credit or other methods of payment; and (4) other information about the physician which a reasonable person might regard as relevant in determining whether to seek the physician's services.

"Testimonials of patients, however, as to the physician's skill or the quality of his professional services should not be publicized. Statements relating to the quality of medical services are extremely difficult, if not impossible, to verify or measure by objective standards. Claims regarding experience, competence and the

quality of the physician's services may be made if they can be factually supported and if they do not imply that he has an exclusive and unique skill or remedy. A statement that a physician has cured or successfully treated a large number of cases involving a particular serious ailment may imply a certainty of result and create unjustified and misleading expectations in prospective patients.

"Consistent with federal regulatory standards which apply to commercial advertising, a physician who is considering the placement of an advertisement or publicity release, whether in print, radio or television, should determine in advance that his communication or message is explicitly and implicitly truthful and not misleading. These standards require the advertiser to have a reasonable basis for claims before they are used in advertising. The reasonable basis must be established by those facts known to the advertiser, and those which a reasonable, prudent advertiser should have discovered.

"As used herein, reference to a 'physician' applies also to information relating to the physician's group, partners, or associates. Any communication or message within the scope of this opinion should include the name of at least one physician responsible for its content."